No. 17-494

IN THE

Supreme Court of the United States

SOUTH DAKOTA

Petitioner,

v.

WAYFAIR, INC., OVERSTOCK.COM, INC., AND NEWEGG, INC.

Respondents.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF SOUTH DAKOTA

PETITIONER'S BRIEF

Marty J. Jackley
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 13, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General &
Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3533

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Jeanne Jeong
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

QUESTION PRESENTED

Should this Court abrogate *Quill*'s sales-tax-only, physical-presence requirement?

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INTRODUCTION

In 1992, this Court recognized that its sales-tax-only, physical-presence requirement for evaluating state tax laws under the dormant commerce clause was probably incorrect. *See Quill Corp. v. North Dakota*, 504 U.S. 298, 311 (1992). Back then, however, it was possible to believe it was not *that* wrong—or at least not that important an error—for essentially the same reason: The exception only sheltered the mail-order industry, and no one could have believed that industry would ever approach the size and importance of physical retail, including the dominant "big-box" stores of the day. Then, and for the foreseeable future, it seemed that most major retailers in a market would need a store, salesperson or some other marginal physical presence to succeed. And even if the physical-presence requirement missed some outlier companies who did enough business to have a "substantial nexus" for purposes of by-then-prevailing doctrine, *see Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977), the Court could console itself that these made up a relatively small slice of the retail industry, limiting the damage this one-off exception could do to the doctrine, state treasuries, and the industry itself.

Times have changed.

Today, the sales-tax-only, physical-presence requirement is both far more wrong and far more significantly so than anyone could have imagined in 1992. It is far more wrong because, in the digital age where ubiquitous e-commerce is projected into our homes and smartphones over the internet, traditional "physical" presence is an increasingly poor proxy for a company's "nexus" with any given market or State. Internet retail now makes it possible to do *billions* in business in

a forum without having a strictly "physical" presence there, while also interacting far more pervasively—and being much more "present"—than catalog mailers ever were. *See, e.g.*, *Direct Mktg. Ass'n v. Brohl* (*DMA*), 135 S. Ct. 1124, 1135 (2015) (Kennedy, J., concurring). Perhaps as a result, these *Quill*-shielded companies now make up a large and expanding slice of retail. This Court's outdated physical-presence rule now causes outsized harms to state treasuries and fundamental unfairness among retailers—a distressing "oddity" for a doctrine that "is all about preventing discrimination between firms." *Direct Mktg. Ass'n v. Brohl* (*DMA II*), 814 F.3d 1129, 1150-51 (10th Cir. 2016) (Gorsuch, J., concurring).

Thus, while it was perhaps possible to disagree in 1992 "with the North Dakota Supreme Court's conclusion that the time ha[d] come to renounce" the sales-tax-only, physical-presence rule, *Quill*, 504 U.S. at 318, that is possible no longer. Indeed, the technological wave that caused the changes above has simultaneously washed away the other theorized benefits of the physical-presence rule. *Stare decisis* does not justify keeping an *ad hoc* exception that is so outdated and harmful. Now, the time *has* come for this Court to revisit the physical-presence rule and hold that South Dakota's statute complies fully with the dormant commerce clause in asking only that retailers like respondents remit their "'fair share of taxes.'" *Complete Auto*, 430 U.S. at 277.

OPINIONS BELOW

The Supreme Court of South Dakota's opinion (Pet.App. 1a-14a) is reported at 901 N.W.2d 754. The trial court's decision (Pet.App. 15a-18a) is unreported.

JURISDICTION

The judgment below, affirming a final judgment on constitutional grounds, was entered September 13, 2017. Pet.App. 1a. The petition for certiorari was filed October 2, 2017, and granted January 12, 2018. This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The "Commerce Clause" provides:

> Congress shall have Power ... To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

U.S. Const. art. I, §8, cl. 3.

STATEMENT

I. Legal Background

A half-century ago, this Court prohibited Illinois's effort to make an out-of-state catalog mailer collect the State's sales or use tax on its transactions with Illinois customers.[1] *See Nat'l Bellas Hess, Inc. v. Dept. of Revenue of Ill.*, 386 U.S. 753 (1967). Invoking both due-process and dormant-commerce-clause doctrine—which the Court called "similar" and "closely related"—*Bellas Hess* held that a company whose "*only*

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[1] Most states have "complementary sales-and-use tax regime[s]" where the in-state purchaser must pay (as a "use" tax) any difference between the State's sales tax and the amount the seller collected at the sale. *See, e.g.*, *DMA*, 135 S. Ct. at 1127. For present purposes, no difference has been suggested between imposing an obligation on sellers to collect the "sales" or "use" tax. For clarity, we use "sales tax" to describe a tax collected and remitted by the seller, and "use tax" to describe a tax remitted by the consumer.

connection with customers in the State is by common carrier or the United States mail" could not be made to collect the sales tax." *Id.* at 756, 758 (emphasis added). It emphasized that the seller there did not have even "'a telephone listing in Illinois,'" nor "'advertise[] its merchandise for sale in newspapers, on billboards, or by radio or television.'" *Id.* at 754.

Bellas Hess's evident concern was that forcing out-of-state catalog mailers to collect sales taxes for every local tax jurisdiction would "entangle [their] interstate business in a virtual welter of complicated obligations." *Id.* at 759-60. But the Court had already "upheld the power of a State to impose liability upon an out-of-state seller to collect a local use tax in a variety of circumstances." *Id.* at 757. *Bellas Hess* thus grounded its holding in the distinction between "mail order sellers with retail outlets, solicitors, or property within a State, and those who do no more than communicate with customers in the State by mail or common carrier." *Id.* at 758. Three Justices dissented, advocating a less mechanical approach where the requisite "nexus" would be judged by the extent to which the out-of-state seller was "exploiting the local market" rather than whether it was doing so only by mail. *Id.* at 760-66 (Fortas, J., dissenting).

A sea-change in this jurisprudence would come a decade later in *Complete Auto*, 430 U.S. 274—a case, much like this one, in which this Court overturned another *per se* rule it had created under the dormant commerce clause. For the previous 25 years, this Court had followed the "*Spector* rule," *see Spector Motor Serv., Inc. v. O'Connor*, 340 U.S. 602, 603 (1951), which held that States could not tax the "privilege of

doing business" if the business was engaged in interstate commerce and the nominal incidence of the tax was on the interstate activity. The rule made certain formal designs "*per se* unconstitutional," *Complete Auto*, 430 U.S. at 288-89, and "deem[ed] irrelevant any consideration of the practical effect of the tax." *Id.* at 278. As a result, economically indistinguishable taxes were upheld or struck down for seemingly arbitrary reasons. *See id.* at 284-85. Accordingly, when Mississippi sought three years of back taxes that Complete Auto had not remitted based on the *Spector* rule, this Court recognized that *Spector* no longer had any "relationship to economic realities," *id.* at 279, and so expressly abrogated its *per se* rule and held for Mississippi. *Id.* at 288-89.

As *Complete Auto* explained, its holding was driven by a steady shift away from focusing on the abstract form of the tax and examining instead whether "the tax produces a forbidden effect." *Id.* at 288; *see also id.* at 278-79, 280-81, 285. It identified two "forbidden effect[s]" that concern the dormant commerce clause: (1) home-state "discrimination" against out-of-state businesses; and (2) laying "undue burdens" upon interstate commerce. *Id.* at 278. *Complete Auto* made clear that, absent those two effects, an interstate business "'should pay its fair share of taxes.'" *Id.* at 277, 288. And so, echoing the *Bellas Hess* dissenters, *see* 386 U.S. at 764, it rejected in full-throat the view that the dormant commerce clause creates "a sort of 'free-trade' immunity" for interstate commerce, and jettisoned a *per se* rule that did "not address the problems with which the Commerce Clause is concerned." *Complete Auto*, 430 U.S. at 278, 288.

Complete Auto identified four requirements to police for the dormant commerce clause's forbidden effects. Under this test—which now governs every state-tax question (save this one)—this Court sustains any tax that "[1] is applied to an activity with a substantial nexus with the taxing State, [2] is fairly apportioned, [3] does not discriminate against interstate commerce, and [4] is fairly related to the services provided by the State." 430 U.S. at 279.

The same Term, this Court held in *National Geographic Society v. California Board of Equalization*, 430 U.S. 551, 558, 560-61 (1977), that neither *Bellas Hess* nor *Complete Auto* prevented California from requiring that a periodical (National Geographic) collect sales tax on merchandise it sold to California residents from the back of the magazine, so long as the company had an office (of any kind) in the State. The Court expressly held that this California office could be completely unrelated to the mail-order sales. *Id.* at 558. This made *Bellas Hess*'s requirement into a purely formal condition: Any physical presence could suffice, even if it had no relation to preventing the discriminatory or undue-burden effects that concerned *Complete Auto*.

Thereafter, this Court's due-process doctrine—which *Bellas Hess* had treated as "closely related" to the dormant commerce clause and the source of its in-state-presence requirement, *see supra* pp.3-4—went in another direction, too. In *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 476 (1985), after a long trend away from a physical-presence focus, this Court squarely held that transacting business with a State resident provided a sufficient "nexus" for the State to regulate

that transaction, whether the out-of-state business "*physically* enter[ed] the forum state" or not.

Then came *Quill*.

In 1992, North Dakota's Supreme Court allowed the State to enforce a tax-collection requirement on an out-of-state catalog retailer whose sole connection to North Dakota was by mail or common carrier. It reasoned that some of the shifts above justified this word-for-word transgression of *Bellas Hess*'s holding. But, "[w]hile [it] agree[d] with much of the state court's reasoning," this Court declined to overrule *Bellas Hess* and reversed. *Quill*, 504 U.S. at 301.

Quill began by agreeing that *Burger King* had abrogated *Bellas Hess*'s due-process rationale. It noted, however, that dormant-commerce-clause and due-process doctrines had come to serve different purposes. *Id.* at 312; *see also id.* at 305-06. The Court thus explained that the first part of the *Complete Auto* test—the "substantial nexus" requirement that "*Bellas Hess* concerns," *id.* at 311, and is at issue here—"is not, like due process' 'minimum contacts' requirement, a proxy for notice, but rather a means for limiting state burdens on interstate commerce," *id.* at 313.

In terms of dormant-commerce-clause *doctrine*, the Court did not attempt to derive *Bellas Hess*'s rule from *Complete Auto* (nor any other case, nor the Constitution), nor did it attempt to demonstrate that *Complete Auto* would come to the same result on the facts presented. Instead, it acknowledged that "in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have *not* adopted a similar bright-line, physical-presence requirement." *Id.* at 317; *see also id.* at 314 (acknowledging that "we have not, in our review of other types of taxes, articulated the same physical-

presence requirement"). *Quill*'s sole doctrinal justification for the physical-presence rule was thus a double-negative: that "[w]hile contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today, *Bellas Hess* is not inconsistent with *Complete Auto* and our recent cases." *Id.* at 311.

Turning from doctrine to policy, the Court concluded that the bright-line physical-presence rule retained some value in avoiding undue burdens on interstate commerce. It echoed *Bellas Hess*'s concern that mail-order vendors would face distinct tax-collection obligations in all of "the Nation's 6,000-plus taxing jurisdictions." *Id.* at 313 n.6 (citing *Bellas Hess*, 386 U.S. at 759-60). And it worried that "[a]n overruling of *Bellas Hess* might raise thorny questions concerning the retroactive application of those taxes and might trigger substantial unanticipated liability for mail-order houses." *Id.* at 318 n.10. Conversely, the Court thought that keeping the "bright-line rule of *Bellas Hess*" might "furthe[r] the ends of the dormant Commerce Clause" by "demarcation of a discrete realm of commercial activity that is free from interstate taxation." *Id.* at 314-15; *contra Complete Auto*, 430 U.S. at 278, 281 (expressly rejecting the "'free trade' immunity" version of the dormant commerce clause). Even though *National Geographic* would make the physical-presence rule "artificial at its edges"—because it could "turn on the presence in the taxing State of a small sales force, plant, or office"—the Court believed this anomaly would be "more than offset by the benefits of a clear rule," which might help avoid a "'quagmire'" of future litigation. *Quill*, 504 U.S. at 315. And so, relying on these policy judgments and "principles of *stare*

decisis"—it "disagree[d] with the North Dakota Supreme Court's conclusion that the time ha[d] come to renounce the bright-line test of *Bellas Hess*." *Id.* at 317-18.

Three Justices (Scalia, Kennedy, and Thomas) concurred to emphasize that they would have relied exclusively on *stare decisis*, particularly because there had been no "flurry of litigation over the meaning of "'physical presence'" between *Bellas Hess* and *Quill*. *Id.* at 321 (Scalia, J., concurring in part and in the judgment). Justice White—the sole Justice remaining from *Bellas Hess*'s majority—changed his view and dissented at length. Among other points, he doubted the bright line would hold and offered "a sure bet that the vagaries of 'physical presence' will be tested to their fullest in our courts." *Id.* at 331 (White, J., concurring in part and dissenting in part).

II. Developments Since *Quill*

While "modern computer and software technology" had reduced the burdens of tax compliance even in 1992, *see id.* at 332 (White, J.), no one could have anticipated the wholesale changes wrought by the coming of the digital age. Shortly after *Quill*, digitization and the birth of the web would revolutionize human commerce and access to information. Data previously available only through analog means—say, tax rules found in legal tomes or product information conveyed on hand-written forms—became instantaneously available to networked computers that could be

programmed to process it just as fast.[2] Nothing would be the same.

That is certainly true for retail. Amazon.com did not begin selling books out of Jeff Bezos's garage until July 1995; even five years after *Quill*, Bezos himself described Amazon as "a pipsqueak in comparison" to Barnes & Noble, while his interviewer struggled to imagine why physical superstores for books "won't just eat you for lunch." *See* John McChesney, *Amazon.com's Jeff Bezos Is Bullish on Books*, Wired (June 1, 1997), https://www.wired.com/1997/06/amazon-coms-jeff-bezos-bullish-books/. With no internet to speak of, *Quill*'s "mail-order houses" referred only to traditional catalog mailers, a relative niche facing seemingly intractable barriers to competing with brick-and-mortar stores when it came to timely pricing and speedy product delivery. Then, the predominant thinking in retail was that large physical stores were eliminating smaller sellers. "E-commerce" was "a totally new, totally unprecedented, totally unexpected development." Peter F. Drucker, *Beyond the Information Revolution*, The Atlantic (Oct. 1999), https://www.theatlantic.com/magazine/archive/1999/10/beyond-the-information-revolution/304658/ (arguing that e-commerce might be the most revolution-

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[2] *See generally* Nat'l Research Council, *The Digital Dilemma: Intellectual Property in the Information Age* 23 (2000), (explaining that internet growth "added substantially to the information sector's production of an astonishing abundance of information in digital form, as well as offering unprecedented ease of access to it," making it "many times easier and faster in the past decade").

ary aspect of digitization). Even years after *Quill*, neither market analysts nor the industry's own champions foresaw that remote retailers with *no* stores might rapidly acquire many competitive advantages and doom the retail titans of an earlier age.[3]

The same is true for how modern digitization and computer networks revolutionized data-intensive tasks. Importantly, this qualitative shift to the "digital age" or "information age" came not only from an increase in computing *power*, but also from an exponential increase in network *access to information*.[4] It is a quirk of *Quill*'s fateful timing that this exponential increase in digitization would begin only a few years later. *See* Martin Hilbert et al., *The World's Technological Capacity to Store, Communicate, and Compute Information* (Apr. 1, 2011), http://www.martinhilbert.net/worldinfocapacity-html (figure demonstrating exponential growth beginning in decade after *Quill* and placing "beginning of the digital age" shortly after 2000). But, nonetheless, *Quill* lies on the other side of the digital divide.

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[3] *See, e.g.*, Regina Joseph, *Online Retail Sales*, Forbes (Dec. 4, 1998), https://www.forbes.com/1998/12/04/feat.html#162a1b165e5b (in 1998, forecasters thought "online shopping [was] still too small to put a dent into traditional retail"); Leslie Walker, *Amazon Gets Personal with E-Commerce*, Wash. Post (Nov. 8, 1998), http://www.washingtonpost.com/wp-srv/washtech/daily/nov98/amazon110898.htm (reporting that "Bezos pooh-poohs speculation that Amazon aspires to be a virtual Wal-Mart Stores Inc., directly selling every product imaginable").

[4] Brian Vastag, *Exabytes: Documenting 'the Digital Age' and Huge Growth in Computing Capacity*, Wash. Post (Feb. 10, 2011), http://www.washingtonpost.com/wp-dyn/content/article/2011/02/10/AR2011021004916.html (detailing skyrocketing growth).

Because nearly all information was analog in 1992, it was impossible then to imagine a world where the data needed to answer almost any question would be immediately available from almost any computer terminal, laptop, or smartphone. Before comprehensive digitization, "Shepardizing" required an up-to-date paper version of Shepard's Citator, hours of trained, painstaking work, and access to an extensive (and expensive) law library—whose volumes themselves required regular updates with "pocket parts" and paper supplements—just to *find* the cases that needed reading. Even the basic building blocks of today's ubiquitous technologies were largely alien to the legal profession several years after *Quill* was decided. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 850-53 (1997) (defining terms including "Web 'pages,'" "links," "surfer," "search engine," "'online services' such as America Online, CompuServe, the Microsoft Network, and Prodigy" and "computer 'mouse'"). Solving something like basic compliance in "6,000-plus taxing jurisdictions," *Quill*, 504 U.S. at 313 n.6, was, then, an entirely different task.

In addition to the tax advantage afforded them, ventures like Amazon and eBay became successful precisely because they digitized and moved to the web all the information necessary to manage the logistical problems of retail.[5] Even specialty buyers and sellers could now find each other, exchange payment info, close transactions, ship products to correct addresses,

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[5] *See E-commerce Takes Off*, The Economist (May 13, 2004), http://www.economist.com/node/2668033 (detailing consumers' ability to use internet to compare prices among "hundreds of merchants" and "access ... unprecedented amount[s] of product information").

and manage back-end business operations across the new "information superhighway." The same data and processes make tax compliance easy too. *See infra* pp.45-46. Indeed, today, we live in a world full of firms dedicated to using "big data" to quickly solve information-driven, logistical problems that make tax compliance seem trivial by comparison. To take just one example, numerous competitors now use digitized maps, global-positioning-satellite data, and real-time location and speed information from millions of smartphones to instantaneously provide the fastest route from anywhere to anywhere, whether walking, driving, or using public transportation, while accounting for traffic and other hazards.[6]

Other key changes came from the States themselves. Not only is tax-compliance information now readily available in digital form, but many States worked together after *Quill* to substantially simplify their sales-tax compliance systems and processes. Under the "Streamlined Sales and Use Tax Agreement," States have standardized numerous aspects of collection and filing, and consolidated others at the state level. *See* Streamlined Sales Tax (SST) Cert. Br. 8-12. South Dakota was active in creating and adopting that Agreement, and is today among 24 States complying with its obligations. Other States that cannot fully comply (often, for state-constitutional reasons) have

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[6] Amy Bernstein & Anand Raman, *The Great Decoupling: An Interview with Erik Brynjolfsson and Andrew McAfee*, Harv. Bus. Rev. (June 2015), https://hbr.org/2015/06/the-great-decoupling ("Digital technologies are doing for human brainpower what the steam engine and related technologies did for human muscle power during the Industrial Revolution" and "allowing us to overcome many limitations rapidly.").

also worked to make compliance by out-of-state sellers as easy as possible. *See, e.g.*, Ala. Code §40-23-191 *et seq.*; Ala. Dep't of Revenue, Simplified Sellers Use Tax, https://revenue.alabama.gov/sales-use/simplified-sellers-use-tax-ssut/. The Agreement also obligates member States to provide (and pay) a set of "certified service providers" (or CSPs) that can handle the process of collecting and remitting sales tax *at no cost to out-of-state sellers*. SST Cert. Br. 12-13.

These CSPs and other software providers have revolutionized tax compliance in the same way companies like respondents revolutionized retail. *See generally* Brief of CSPs as *Amici Curiae*, Part A. Analogage tax programs had "some of the data necessary for accurate tax assessment and accounting built in, but not all of it, and they had no built-in method for dealing with changes other than constant software updates." Diane L. Yetter & Joe Crosby, *No Excuses: Automation Advances Make Sales Tax Collection Easier for Everyone*, State Tax Notes 571, 575-76 (Aug. 7, 2017), http://www.yettertax.com/review/wp-content/uploads/2017/09/State_Tax_Notes_Automation_Article.pdf (providing detailed history of tax-compliance automation). The first software that could interface directly with e-commerce platforms was not released until 1996, and even that product was hosted on the user's servers and needed constant manual updates. *Id.* "The biggest change ... would come with the rise of modern, web-based ... solutions," *id.* at 576, and the first such product was introduced in 2000. *Id.* In sum:

> When *Quill* was decided, there were basically two providers with structured solutions that required each business to invest heavily in infrastructure. There are currently at least 33

> providers ... covering sales tax rates, sales tax calculation, address validation, sales tax return preparation, and exemption certificate management, most of which integrate directly with hundreds of different online shopping carts. Most providers offer software as a cloud or hosted solution[,] .... [and] the functionality offered today includes taxability content that did not exist in 1992.
>
> ....
>
> [T]here is obviously still a cost to sellers—whether online or Main Street stores—in mapping their products and services to the appropriate tax rules. It is beyond dispute, however, that the overall cost from this effort has been reduced dramatically.

Id. at 579-80.

III. Case History

In 2015, this Court considered a Colorado law enacted to encourage its citizens to pay at least some of the use taxes owed on out-of-state internet sales. That law required out-of-state sellers to (1) "send a 'transactional notice' to purchasers informing them that they may be subject to Colorado's use tax," (2) "send Colorado purchasers who buy goods from the retailer totaling more than $500 an 'annual purchase summary' with the dates, categories, and amounts of purchases, reminding them of their obligation to pay use taxes," and (3) "send [Colorado] an annual 'customer information report' listing their customers' names, addresses, and total amounts spent." *DMA II*, 814 F.3d at 1133. Compliance was arguably *more* burdensome on the seller than simply collecting the tax, *see id.* at

1146, but Colorado carefully avoided imposing a *collection* requirement of the kind foreclosed by *Quill*.

While the issue was not presented there, the troubling facts that gave rise to Colorado's effort led Justice Kennedy to conclude that *Quill* should be reconsidered, and to encourage "the legal system" to quickly find a vehicle for doing so. *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring).

South Dakota answered that call, and for good reason. It "has no state income tax and relies on retail sales and use taxes for much of its revenue." Pet.App. 1a. So "[a]s Internet sales by [out-of-state] sellers have risen, state revenues have decreased," Pet.App. 2a, leading to serious shortfalls. Indeed, at the very moment it passed the law at issue here, the Legislature felt compelled to raise the sales-tax rate to help increase teacher salaries. *See* H.B. 1182, 91st Legis. Assemb. Session (S.D. 2016). To better address such shortfalls, South Dakota passed "S.B. 106" (or "the Act").

The Act looks to a seller's economic presence within a State, rather than "physical presence," in requiring certain out-of-state sellers to collect and remit sales tax. The operative section requires collection by any retailer transacting more than $100,000 of business or more than 200 times annually with state residents. *See* App. 1a (§1). The Legislature also took multiple steps to protect out-of-state sellers during the inevitable litigation this law would precipitate, including provisions insulating them from interim obligations and any threat of retroactive liability, *see* App. 2a-4a, 6a (§§3, 5-7, 8(10)). The law passed with overwhelming support after public hearings, and included

detailed findings regarding the changed circumstances that drove the Legislature's decision. *See* Pet.App. 8a-9a; App. 4a-6a (§8).

As the Act permitted, the State eventually sued four out-of-state retailers, seeking equitable relief affirming the law's validity and requiring these sellers to begin collecting tax. Pet.App. 9a-10a. Three are respondents here; a fourth (Systemax Inc.) preferred not to assert its *Quill* defense. Instead, the State agreed to dismiss its complaint, and Systemax "registered for a sales tax license and immediately began collecting taxes under the law" the next day. Pet.App. 10a.

Respondents moved for summary judgment on the exclusive ground that South Dakota could not establish "nexus" under *Complete Auto*'s first prong because of *Quill*'s controlling, physical-presence rule. They challenged none of the Legislature's findings; their position was simply that *Quill* would require their victory regardless. *See* Pet. Reply 4. "Mindful of [this] Court's directive to follow its precedent when it 'has direct application in a case,' and to leave to th[is] Court 'the prerogative of overruling its own decisions,'" the state courts granted and then affirmed respondents' motion, placing the continuing viability of the sales-tax-only, physical-presence rule squarely before this Court. Pet.App. 14a, 15a.

SUMMARY OF ARGUMENT

Before it will abrogate a rule it has previously endorsed, this Court requires a showing that the rule is wrong, along with "special justifications" to overcome *stare decisis*. *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015). There is no definitive set of factors, but the Court has highlighted the considerations that

often matter most. These include, among other things, whether the rule is: (1) inconsistent with other decisions; (2) particularly harmful or important; (3) detrimental to the doctrine or its ends; (4) supported by legitimate reliance interests; (5) unsupported because of changed circumstances; (6) increasingly unworkable; (7) routinely criticized (8) constitutional or statutory; and (9) necessary to a holding, or instead a rationale that did not (or could not) intentionally reach the present facts. This brief proceeds in three parts, each of which addresses some of these concerns.

Part I begins by explaining that the sales-tax-only, bright-line, physical-presence rule is inconsistent with current dormant-commerce-clause doctrine and leads to conflicting results (Part I.A). This may amount to pushing on an open door: *Quill* itself acknowledged that the physical-presence rule had a tenuous connection to the doctrine even then, and subsequent legal developments have only served to further isolate this exception to *Complete Auto* (Part I.B).

Importantly, even when considered on its own terms, the physical-presence rule sits upon a foundation of essentially *factual* premises, frozen in time, about the burdens of collecting sales tax and the likelihood that the rule will promote or undermine the goals of the dormant commerce clause. Those factual premises have now been reversed; the "tides of time" have now comprehensively "wash[ed] away" whatever foundation *Quill*'s rule ever had. *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring). Thus, abrogating the physical-presence requirement is now essential to eliminate arbitrary and unclear results, *promote* interstate commerce, and avoid important, ongoing, and unjustifiable harms to the several States (Part I.C).

Part II focuses on the principle concerns that appeared to animate *Quill*'s decision to retain *Bellas Hess*'s rule, and demonstrates that those concerns are absent here.

First, in contrast to the law at issue in *Quill*, the rule enacted in South Dakota's statute is now superior to the physical-presence requirement *on all of Quill's own criteria*. South Dakota's "economic nexus" standard is easier to administer and far more likely to promote efficiency in the national economy and interstate commerce. (Part II.A).

Second, the *stare decisis* case for retaining the physical-presence rule is weaker here than in *Quill* because its application to modern internet retail was not a considered aspect of *Quill*'s holding. *Bellas Hess* was explicitly about a mail-order house whose only nexus was established through periodic mailings. *Quill* presented *identical* facts and considered only whether the *law* had changed in the interim. In contrast, the internet retailers at issue here are very different from the companies in *Quill* and *Bellas Hess*. While "physical presence" may sound like it was meant to resolve a case like this, it was in fact an unremarkable pleonasm in 1992 because there was no "virtual" or "internet" presence from which to distinguish it. So while the physical-presence rule must be abrogated for petitioner to prevail here, this Court need not overrule *Bellas Hess* as such to hold that its rule now maps poorly onto internet-age facts this Court had no previous chance to consider. (Part II.B).

Third, the alleged practical difficulties of collection have now vanished. Modern digitization and network computing make this the kind of task that is

daunting only to those with a reason to make it look so. (Part II.C).

Fourth, both legally and practically, this Court would create no unique possibility of retroactive tax liability by abrogating the physical-presence rule. South Dakota disavowed retroactive liability, and most states are likely to follow its lead—we are aware of no official among the 7,000-plus lawmakers in the 50 States who has suggested imposing retroactive liability. Indeed, many States do not have a current regime that would allow them to seek retroactive liability, and state law and federal constitutional barriers would stand in the way, even if they did. (Part II.D).

Part III then concludes by highlighting how these points map onto many of the remaining "special justifications" this Court looks to in considering questions of *stare decisis*. The key points here are the manifest change in circumstances, *see, e.g.*, *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring); the absence of justified reliance, *see, e.g.*, *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring); *Quill*'s outlier status, *see, e.g.*, *Comptroller v. Wynne*, 135 S. Ct. 1787, 1809 (2015) (Scalia, J., dissenting) (deriding the "ad hoc ... sales-taxes-on-mail-orders exception"); the increasing unworkability of the rule, *see, e.g.*, *Lamtec Corp. v. Dep't of Revenue*, 246 P.3d 788, 793 (Wash. 2011) (agreeing with other courts that even a "'*substantial* physical presence test'" would be unworkable); and its persistent criticism by disinterested judges and academics (*see, e.g.*, above).

Ultimately, *Quill*'s serious harms require this Court to act. Congress cannot "fix" this kind of constitutional mistake; it can only *moot* it by choosing to de-

volve powers back to the States—and 25 years of inaction since *Quill* demonstrate that it is unlikely to do so. Congress might be encouraged to act if this Court required it to pass a law regulating interstate commerce, as the Commerce Clause's text allows. But only this Court can restore to the States the *default* powers reserved to them by the Constitution and Tenth Amendment. *See infra* pp.53-55.

ARGUMENT

I. The Physical-Presence Rule Requires This Court's Correction.

Quill acknowledged that "contemporary Commerce Clause jurisprudence might not dictate the same result were the issue to arise for the first time today," 504 U.S. at 311, that "subsequent" cases "concerning other types of taxes ... have not adopted a similar bright-line, physical-presence requirement," *id.* at 317, and that the rule leads to results that "appea[r] artificial at its edges," *id.* at 315. These were understatements then, and have only become more so.

This case itself demonstrates that the physical-presence rule leads to results that are squarely inconsistent with the "substantial nexus" test of *Complete Auto*. The rule has thus been quarantined from its doctrinal neighbors since the day *Quill* was decided. Meanwhile, the factually contingent policy judgments that form the rule's sole support have proven contrary to experience in a technologically evolving world. As a result, the rule is now artificial at its core—not its edges—leading to arbitrary distinctions that are increasingly unclear, harmful to the States and the economy, and often directly contrary to the dormant commerce clause's own ends.

A. As this case shows, the physical-presence rule is squarely inconsistent with *Complete Auto*'s "substantial nexus" test.

The best way to see that the physical-presence rule is squarely inconsistent with the underlying doctrine is to test South Dakota's law against that doctrine. S.B. 106 may violate the bright-line physical-presence requirement, but it would plainly pass muster under *Complete Auto*.

As *Quill* notes, 504 U.S. at 311, and respondents acknowledged below with their limited challenge, *supra* p.17, the physical-presence rule relates only to the first element of the *Complete Auto* test: the "substantial nexus" requirement. The question thus becomes whether the sellers covered by S.B. 106 have "substantial nexus" for purposes of *Complete Auto* and its progeny. And they certainly do.

As an initial matter, this Court has never explained how a sale into a State is insufficient *by itself* to create a "substantial nexus" between "a state and the person, property *or transaction* it seeks to tax," *e.g.*, *Miller Bros. v. Maryland*, 347 U.S. 340, 344-45 (1954) (emphasis added). Note that, in *Quill*'s own terms, *Complete Auto* requires that a tax be "'applied to an *activity* with a substantial nexus with the taxing State,'" not a tax-collecting *company* with nexus. 504 U.S. at 311 (emphasis added) (quoting *Complete Auto*, 430 U.S. at 279). Since *Quill*, this Court has said that "a sale of tangible goods has a sufficient nexus to the State in which the sale is consummated to be treated as a local transaction taxable by that State." *Okla. Tax Comm'n v. Jefferson Lines, Inc.*, 514 U.S. 175, 184 (1995). All South Dakota asks here is to treat

a sale consummated in South Dakota "as a local transaction"—as *Complete Auto*'s language expressly allows.

This Court need not approach such a broad holding, however, to uphold South Dakota's law. Even if the regulated company must itself have the requisite "substantial nexus," S.B. 106 applies only to companies that (easily) do. The Act's ample safe harbor shelters sellers transacting less than 200 times or doing less than $100,000 of business in the State each year. That is a substantial nexus to a small economy like South Dakota's. Scaled to the national economy by relative gross domestic product, South Dakota's law would apply only to businesses making over 75,000 sales or doing well over $30 million in U.S. business. From the standpoint of "substantial nexus" rather than "physical presence," South Dakota's economic standard applies only to persons *and* transactions that have a very strong connection to the State.

As in *Complete Auto*, moreover, respondents have not argued and could not argue that *they* lack a "substantial nexus" with South Dakota by any measure other than the bright-line, physical-presence rule. *See* 430 U.S. at 277-79 (noting that Complete Auto had only invoked bright-line *Spector* rule and did not otherwise challenge its substantial nexus). These companies do *billions* in sales annually on the whole, and South Dakota sent them direct notice of S.B. 106 because it estimated their in-state sales in the millions. Economically, these companies are far more "present" in the South Dakota economy than most of the State's physically present retail businesses, many of whom have only one retail outlet, but must still collect tax on

sales sent to the other side of the State—a time zone and five-hour drive away.

It is worth remembering that, in doctrinal terms, the proposition here is that the *Constitution* somehow prohibits a State from demanding from online-only retailers—who intentionally sell huge quantities of their wares into the State—the same sales-tax collection it demands from everyone else. In a world where many of the most powerful retail companies do not and need not rely on physical presence for their business models, that rule seems only senseless and unfair. The accretion of one common-law precedent upon another can sometimes explain such outcomes. Here, however, the manifest disconnect between the physical-presence rule and the underlying doctrine (and founding document) can only empower the critique that "[w]hatever it is that we are expounding in this area, it is not a Constitution." *Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 203 (1990) (Scalia, J., concurring in the judgment); *see also, e.g.*, *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 610 (1997) (Thomas, J., dissenting) (rejecting the dormant commerce clause as an atextual basis on which to invalidate state laws).

B. The physical-presence rule is an outlier.

Since *Quill*, the physical-presence requirement has achieved the rare status of a rule with no animating principle that lower courts must (or even can) follow in similar cases. Instead, courts have reasoned that *Quill*'s rationale requires *ignoring* physical presence outside the precise context presented in that case.

As then-Judge Gorsuch observed, *DMA II*, 814 F.3d at 1149, this development seems driven by *Quill*

itself. By noting that "in our cases subsequent to *Bellas Hess* and concerning other types of taxes we have not adopted a similar bright-line, physical-presence requirement," *Quill* invited lower courts to ignore the physical-presence rule in "cases ... concerning other types of taxes." 504 U.S. at 317. So that's what they did. In a variety of cases and contexts, challengers have asserted that one or another tax should be covered by the physical-presence rule—or even that it is practically indistinguishable from a sales tax—to no avail in the lower courts or this Court. *See, e.g.*, *KFC Corp. v. Iowa Dep't of Revenue*, 792 N.W.2d 308, 320 (Iowa 2010) (collecting cases and noting that "[a]fter *Quill*, [this] Court has generally avoided Commerce Clause cases involving the authority of states to impose taxes other than sales and use taxes on out-of-state entities with or without 'physical presence'").[7] This has shrunk *Quill*'s already narrow doctrinal field, even as that field has grown rapidly in importance because of online retail.

The lower courts have also limited the physical-presence test in other ways. The Tenth Circuit "and many othe[r] courts have already held *Quill* does nothing to forbid states from imposing regulatory and tax duties of comparable severity to sales and use tax collection duties," even in the very context of sales-and-use taxes. *DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring); *see also id.* at 1144-47 (majority) (upholding

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[7] *See also DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring) (collecting cases); *Crutchfield Corp. v. Testa*, 88 N.E.3d 900, 902-03, 911-14 (Ohio 2016) (upholding "corporate activities tax" calculated based on gross receipts from in-state sales).

reporting regime despite comparable or greater burdens in same sales-tax context). This isolates *Quill* from its own purpose: An out-of-state retailer cannot point to the same sales-tax-related burden that *Quill* sought to avoid and get relief from anything other than strict tax *collection*, because the lower courts recognize that physical presence no longer has anything to do with the burden on remote retailers or any other underlying constitutional value.

Second, and relatedly, the lower courts have held that *Quill* must *necessarily* be limited to requiring only marginal physical presence because any further requirement would prevent it from serving as a bright line. In this regard, both the Washington Supreme Court and New York Court of Appeals have been asked to hold that *Quill* requires "a *substantial* physical presence," and both have expressly refused. *See Lamtec*, 246 P.3d at 793-94; *Orvis Co. v. Tax Appeals Tribunal of N.Y.*, 86 N.Y.2d 165, 180-81 (N.Y. 1995). They have reasoned that, given the lack of guidance or guiding principles on what makes physical presence sufficient or important, searching for "substantial" or "continuous" physical presence would immediately devolve into confusing case-by-case determinations. This means that the lower courts view *Quill*'s criteria as legally and intentionally *in*substantial—that the rule's only reasons for existing are that it (1) is a rule and (2) is binding as a precedent of this Court.

These developments demonstrate that the physical-presence rule is adrift—not only "surrounded by a sea of contrary law," *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring), but also unmoored from any constitutional principle or value that could guide its ap-

plication. This is not surprising given that *Quill* "expressly acknowledged" that the physical-presence requirement could lead to "pretty 'artificial' and 'formalistic'" results. *Id.* at 1149 (quoting *Quill*, 504 U.S. at 314-15). But, 25 years later, it remains surprisingly unclear *why* physical presence is important for sales-tax collection requirements but no other tax or regulatory burdens of comparable severity. Nor is it clear what makes a presence "physical," nor why physicality matters even in *Quill*'s own context. And while this Court has said that the "'slightest presence'" might not suffice, *see Nat'l Geographic*, 430 U.S. at 556, it has approved nexus through unrelated, transient, or insubstantial presence without explaining how much is enough, or why. *See id.* at 561 (two in-state offices unrelated to retail activity sufficient); *Standard Pressed Steel Co. v. Dep't of Revenue of Wash.*, 419 U.S. 560, 562 (1975) (single employee serving single customer from his own home in state sufficient; contrary argument "verges on the frivolous"); *Gen. Trading Co. v. State Tax Comm'n of Iowa*, 322 U.S. 335, 337 (1944) (*traveling* salesmen sent into State sufficient). Rules that serve no underlying constitutional principle cannot contribute anything or be applied in any sensible or substantial way outside their immediate context. And that's what has happened to *Quill* as it has outlived its useful life.

C. The application of the physical-presence rule has become both arbitrary and unclear, causing unintended and harmful effects.

If the physical-presence rule were only a doctrinally unsound outlier, it might not merit further concern. But it's much worse than that. The rule governs

a critical slice of the American economy, and because of the changes wrought by online retail, its application is increasingly arbitrary and decreasingly clear. The rule now frequently undermines the very values the dormant commerce clause is meant to serve, causing outsized harm to the national economy, state treasuries, and interstate commerce itself.

1. Internet retail has made the physical-presence rule more arbitrary and unclear.

Quill rested on the policy judgment that a bright-line rule would at least provide some clarity and likely serve the dormant-commerce-clause goal of avoiding "[u]ndue burdens" on interstate commerce. 504 U.S. at 314-15 (suggesting that "the benefits of a clear rule" in this area would offset "artificial" results). These judgments are now upside down: Under modern conditions, *Quill*'s effects are no longer artificial only "at the edges," and the physical-presence rule cannot be applied in any clear way—at least not without undermining the values the doctrine is meant to promote.

For one thing, pervasive internet retail has undermined *Quill*'s working assumptions. The intuition behind making physical presence a "bright-line" requirement is that there is at least some reasonably strong correlation between the States where a seller has sufficient operations to create a "substantial nexus" and the States where it establishes a presence on the ground. In an era where the first rule of retail was "location, location, location," using physical presence as a proxy for "substantial nexus" made sense. Now, it doesn't.

Today, out-of-state retailers can have a strong connection to any given forum—and so derive comprehensive economic benefits from that forum's market

and state services—without any "physical" presence at all. *See* Drucker, *supra* ("[I]n e-commerce there are neither local companies nor distinct geographies."). In large part, that is because the internet now makes it possible for out-of-state sellers to reach consumers with engaging, interactive virtual storefronts in our homes or on our smartphones at any hour of the day. Economists have demonstrated that this pervasive access has turned the physical stores of *other* retailers into virtual showrooms for remote sellers, whose tax-advantage now leads to far more diversion of buyers than was ever true for catalog mailers. *See infra* pp.36-37. Accordingly, what establishes a connection between a forum and a seller—what makes them "present" in our States and in our lives—now has little to no relationship with where that seller inhabits a brick-and-mortar building, and much more to do with their scale or economic presence in the forum.

In fact, compared to looking at a seller's economic presence, the physical-presence requirement now manages to be both over- and under-protective. Amazon's branded boxes on neighborhood doorsteps are a pervasive fact of everyday life. No one could nonetheless conclude that Amazon has a weaker "nexus" to Bethesda, Maryland than does a modest internet operation that sometimes operates a pop-up outlet in Baltimore. The former has the scale, business connections, and economic presence that make it more than reasonable to demand that it pay its "fair share of state taxes." *D.H. Holmes Co. v. McNamara*, 486 U.S. 24, 31 (1988). The latter, meanwhile, might really be so small in scale or disconnected from distant locales in the State that it is unreasonable to demand its statewide compliance.

Meanwhile, many substantial internet retailers have apps on our smartphones and track our activities with software they install (sometimes, unannounced) on our computers or watches. These pervasive interactions would seem to make that retailer's forum relationships more viscerally present in the market than any *unrelated* physical plant. Accordingly, the physical-presence test now consistently reaches those who are present in physical but trivial ways and ignores those who are present in non-physical but meaningful ways. *See, e.g.*, *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring). A bright-line rule that is meant to be a proxy for "substantial nexus" should at least reflect the realities of modern retail, not the economic arrangements prevalent in 1992.

In fact, in an increasingly digital (and decreasingly physical) economy, the physical-presence rule routinely looks to unintuitive criteria, making it a trap for the unwary. Today, if a seller hires a software engineer who (unbeknownst to them) proceeds to *work on* the seller's website in a particular forum, then the seller needs to collect sales tax there. *See, e.g.*, Ariz. Dep't of Revenue, Publication No. 623: Nexus in Arizona (rev. Feb. 2018), https://www.azdor.gov/Portals/0/Brochure/623.pdf ("Independent contractors ... present in Arizona for more than two days per year" may establish "nexus" and trigger liability). Conversely, if people actually *use* the website to *buy* millions of dollars of goods in the forum, that creates no sales-tax nexus at all. This is to say that, in the internet age, traditional conceptions of "physical" presence will miss the point more often than not, *see, e.g.*, *DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring), and so

some sellers may miss the point, too—unwittingly stumbling into substantial, unforeseen tax liability.

In this way, the internet revolution in retail has not only made physical presence a very poor proxy for "substantial nexus" but has also undermined *Quill*'s core premise that the physical-presence requirement would function as a *clear* safe harbor for out-of-state sellers. Today, determining physical presence is an increasingly fraught and difficult question mostly because modern commerce just does not map onto traditional notions of "physical" presence in obvious ways. Does the presence of the Overstock.com app on consumers' smartphones count? Does its interactive storefront on desktop computers? What consequence is there if these companies install uninvited "cookies" on users' devices that monitor their online interactions and provide targeted advertising? Or what if a buyer ends up finding a product on one website through an advertised link on another site that has physical presence and gets paid a commission based on ad clicks? The website may be "located in no particular geographical location," but what about the servers that host it—do they count? Questions like these have already led to expensive, confusing, and high-stakes litigation as States increasingly grapple with and/or expand their definitions of physical presence—a development that entirely post-dates *Quill*. *Compare* 504 U.S. at 321 (Scalia, J., concurring) (relying on absence of litigation on this issue between *Bellas Hess* and *Quill*), *with* Pet. 9-11 (maps of various "expanded physical nexus" laws and proposals in states as of September 27, 2017), *and Overstock.com, Inc. v. N.Y. State Dep't of Taxation & Fin.*, 987 N.E.2d 621 (N.Y. 2013) (upholding New York's "click-through nexus" or "Amazon"

law). And if this Court were to retain the physical-presence rule, States would only become more likely to test these boundaries given the budget shortfalls the physical-presence rule has engendered.

Ultimately, what prevents *Quill* from currently delivering on its own promise of clarity is the same thing that makes it increasingly isolated and arbitrary as a precedent—namely, that it is admittedly "'artificial' and 'formalistic.'" *DMA II*, 814 F.3d at 1149 (Gorsuch, J., concurring) (quoting *Quill*, 504 U.S. at 314-15). Because the scope of an arbitrary rule is hard to discern, neither courts nor retailers themselves can confidently predict what kinds of "presence" will be considered "physical" enough once States begin (as they have) to push the envelope. If the physical-presence rule cannot produce even the clarity that was supposed to offset its "artificial" results—or if it needs to be rendered even *more* artificial just to keep it clear, *see supra* p.26—the law would be better off without it.

2. The effects of the physical-presence rule are increasingly harmful.

The foregoing shows that the physical-presence rule neither provides clarity nor vindicates constitutional values. But perhaps more important is that the rule also causes quite a lot of real-world harm. In fact, the rule frequently *undermines* the goals of dormant commerce clause jurisprudence, and in so doing, hurts the States, the retail industry, and the economy as a whole.

First, from the standpoint of dormant-commerce-clause values themselves—particularly, non-discrimination—the physical-presence rule now does more harm than good. As then-Judge Gorsuch explained, it is an "analytical oddity" of "the *Bellas Hess* branch of

dormant commerce clause jurisprudence" that it "guarantees a competitive benefit to certain firms simply because of the organizational form they choose to assume while the mainstream of dormant commerce clause jurisprudence ... is all about preventing discrimination between firms." *See DMA II*, 814 F.3d at 1150-51. A rule that leads directly to discrimination between different kinds of firms engaged in interstate commerce turns the dormant commerce clause upside down. And it can only lead to further confusion as States enact new rules (like Colorado's reporting requirement) that try to *restore* competitive balance by imposing different burdens on companies that refuse to collect the tax—and who will then cry discrimination. *See, e.g.*, *id.* at 1142-45 (majority).

Second, the physical-presence rule *creates* a substantial burden on many forms of interstate commerce. As indicated above, many firms now work hard to *avoid* engaging in interstate commercial relationships in order to preserve their apparent duty-free status. But when a Missouri company builds a store in Montana, a Colorado firm hires a sales team in Connecticut, or an Alabama retailer makes deliveries to Arkansas with its own trucks, each is engaged in interstate commerce. The physical-presence rule discourages this interstate commerce on its face; firms maximize the effective subsidy from *Quill* if they minimize their interstate presence and stick to shipping from one State to all the others.

This is entirely backwards: If a State discouraged investment by out-of-state firms by subjecting them to special fees or taxes only if they established an in-state presence or hired an in-state worker, that law would *violate* the dormant commerce clause. *See Camps*

Newfound, 520 U.S. at 578 ("[P]rohibitions on out-of-state access to in-state resources serve the very evil that the dormant Commerce Clause was designed to prevent," and "special fees assessed on nonresidents directly by the State when they attempt to use local services impose an impermissible burden on interstate commerce."). The physical-presence rule is thus a policy at war with itself; it undermines rather than advances the economic union the dormant commerce clause is meant to promote. *See, e.g.*, *Fulton Corp. v. Faulkner*, 516 U.S. 325, 333 n.3 (1996); *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 393 (1994) (goal of doctrine is to create "a national market" and prevent "'economic Balkanization'").

The damage this inversion of dormant-commerce-clause values is doing to the States is well-documented and attested to by the breadth of the States' support for petitioner here. As Justice Kennedy explained, Colorado alone lost around $170 million in 2012 because it could not require out-of-state retailers to collect sales tax. *See DMA*, 135 S. Ct. at 1135 (citing Donald Bruce, William F. Fox & LeAnn Luna, *State and Local Government Sales Tax Revenue Losses from Electronic Commerce* 11 tbl.5 (2009)). That year, state and local governments as a whole were owed an estimated $23 billion in sales-tax revenues that out-of-state retailers could not be obligated to collect under

Quill.[8] An updated study projects their likely losses at $33.9 billion in 2018 and $211 billion from 2018-2022.[9]

Conditions in South Dakota vividly illustrate the harm. The State is dependent on its sales tax, and yet even respondents themselves have calculated the State's *Quill*-related losses at about $21 million/year (while making several self-serving assumptions).[10] State officials put that number closer to $50 million for FY2018.[11] Either way, these are big sums in a small State. *See* Pet. 13-15. And the problem only grows worse as more and more sales move online—while overall retail grew only 1.9 percent from 2014 to 2015, internet retail grew by 14 percent.[12] *See also DMA*, 135 S. Ct. at 1135 (Kennedy, J., concurring) (stressing that while "mail-order sales" at time of *Quill* totaled "$180 billion," "e-commerce sales alone totaled $3.16 trillion" in 2008). Absent a change here, states and local governments will fall only further behind.

The problem is also self-reinforcing in multiple ways. Raising sales-tax rates to make up the shortfall

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[8] Nat'l Conference of State Legislatures, *Estimated Uncollected Use Tax from All Remote Sales in 2012*, http://www.ncsl.org/research/telecommunications-and-information-technology/2012-uncollected-use-tax.aspx.

[9] Int'l Council of Shopping Ctrs., *Case for Fairness*, http://www.efairness.org/files/united-states.pdf.

[10] Appellees' Br. 21, http://ujs.sd.gov/uploads/sc/calendar/28160C_State_v_Wayfair.pdf.

[11] Gov. Dennis Daugaard, Budget Address (Dec. 6, 2016), http://sd.gov/governor/docs/FY2018%20Budget%20Address%20Transcript.pdf.

[12] U.S. Census, *Estimated Annual U.S. Retail Trade Sales—Total and E-commerce I: 1998-2015*, http://www2.census.gov/retail/releases/current/arts/ecommerce.xls.

only pushes more consumers online, where the advertised prices now seem even lower because of the absent tax. Economic research has shown this effect to be particularly strong, *see, e.g.*, Liran Einav et al., *Sales Taxes and Internet Commerce*, 104 Am. Econ. Rev. 1, 24 (2014) ("[A] one percentage point increase in a state's sales tax leads to an increase of just under 2 percent in online purchasing from other states, and a 3-4 percent decrease in online purchasing from home-state sellers."), and far stronger for internet retail than it ever was for catalog-mailers, *see, e.g.*, Eric T. Anderson et al., *How Sales Taxes Affect Customer and Firm Behavior: The Role of Search on the Internet*, 47 J. Marketing Research 229, 239 (2010) (finding major effect from tax collection on online retail, but "no apparent effect on catalog orders"). Rates thus need to rise even more to make up the shortfall—shrinking the base even further in a vicious cycle.

A similar spiral surrounds State spending and economic effects. Diverting sales to companies that actively avoid creating local jobs or spending on local infrastructure leads simultaneously to a weaker local economy and less tax revenue. With less revenue, local governments themselves hire fewer teachers, police officers, and maintenance crews, draining yet more fiscal fuel from the economy. The pain from *Quill* thus goes beyond even the "extreme harm and unfairness" Justice Kennedy identified, *DMA*, 135 S. Ct. at 1134, because this particular tax imbalance is an enemy of economic efficiency and growth. *See generally* Arthur B. Laffer & Donna Arduin, *Pro-Growth Tax Reform and E-Fairness* (2013), http://www.efairness.org/files/dr-art-laffer-sudy.pdf.

The physical-presence rule is also reshaping American communities and distorting the national economy. Changing conditions mean that *Quill* no longer props up a retail niche but rather provides a *further* advantage to companies like respondents on a playing-field already tipped against small, local businesses. Out-of-state vendors like respondents "don't seek comparable treatment to their in-state brick-and-mortar rivals" when they invoke *Quill*; rather, "they seek more favorable treatment, a competitive advantage, a sort of judicially sponsored arbitrage opportunity or 'tax shelter.'" *DMA II*, 814 F.3d at 1150 (Gorsuch, J., concurring). Multiple studies by noted economists confirm that this "arbitrage" is harming local retail by diverting sales to online competitors. *See, e.g.*, Austan Goolsbee, *In a World Without Borders: The Impact of Taxes on Internet Commerce*, 115 Q.J. Econ. 561 (2000). And that leads not only to economic inefficiency but also to decay in local communities. Retail provides important job opportunities in towns that need them, and unfair tax rules should not push those jobs to distant tech companies. Meanwhile, empty storefronts and abandoned retail institutions both contribute to creeping economic anxiety and signal the disappearance of shared spaces and experiences in small towns and big cities alike.

In 1992, there was no modern internet and "a paucity of research on the subject of state sales tax effects on consumer behavior in mail order purchasing decisions." *See* Michael L. Klassen, Karen Glynn & Kathleen Porter, *Sales Tax Effects on Mail Order Consumer Purchasing Decisions*, 8 J. Direct Marketing 21, 22 (1994). Now, peer-reviewed research like the studies

cited above have shown that, *particularly* in the internet era, these effects on consumer behavior are devastating to retail-industry fairness and state revenues alike. *See supra* pp.36-38. Particularly because *Quill* is itself grounded in factually contingent policy judgments, this Court should take account of these present realities and abrogate its sales-tax-only, physical-presence exception.

II. The Concerns That Animated *Quill*'s Decision To Retain *Bellas Hess*'s Rule Are No Longer Present.

Although the foregoing suffices to reject the physical-presence rule, there are four further, key respects in which concerns that seemingly animated *Quill* have either vanished or flipped the other direction in the intervening 25 years. These changes make it appropriate to abrogate the physical-presence rule and demonstrate that *stare decisis* principles (discussed in more detail in Part III) have less force here than they otherwise might.

A. South Dakota's statute serves *Quill*'s own goals better than the physical-presence rule.

Not only does S.B. 106 clearly satisfy *Complete Auto*'s nexus requirement, *see supra* pp.22-24, it is now better than the physical-presence rule at advancing *Quill's own goals*.

Whereas physical presence is increasingly arbitrary in assessing both a seller's connection to a State and its ability to shoulder the burdens of sales-tax collection, "economic nexus" tracks both perfectly. Sales shipped to residents are a direct measure for how systematically a seller exploits a given market. And,

more importantly, the burden imposed by state sales-tax collection is now inversely correlated to scale. In the analog days of *Bellas Hess* and *Quill*, it was possible to believe that national catalog mailers faced a particularly difficult task in complying with the rule in "6,000-plus taxing jurisdictions." *Quill*, 504 U.S. at 313 n.6. But because this is now a problem easily solved through specialized software, achieving nationwide scale rapidly *decreases* the difficulty and expense of multi-jurisdictional compliance. *See infra* Part II.C. Put simply, the size and reach of a seller's economic connections are better measures than physical presence of *everything* the dormant commerce clause might care about.

Similarly, an economic-presence standard now makes for a much brighter and straighter line than physical presence. Today's data-driven businesses know their sales by jurisdiction perfectly well; monitoring against accidental physical presence is harder and the nature of the requirement far more litigable. *See supra* pp.30-32.

Indeed, this Court has recognized since *Quill* that a term like "physical presence" is hard to correctly apply to corporations like respondents in *any* respect because their "ability to conduct business *without physical presence* ha[s] created new problems *not envisioned by rules developed in another era*." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994) (emphasis added). Even this Court itself does not use the phrase consistently: Since *Quill*, this Court has made clear that many of the things that appear to pass for corporate "physical presence" under *Quill* do *not* count as corporate "physical presence" for purposes of general personal jurisdiction. *Compare supra* p.27 (collecting

cases where limited physical presence suffices for dormant commerce clause), *with Burnham v. Superior Court*, 495 U.S. 604, 620 (1990) (plurality) (making "physical presence" sufficient for general personal jurisdiction), *and Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. 915, 924 (2011) (corporation only present for general jurisdiction purposes in State of incorporation or principal place of business—not all places that suffice under *Quill*). If clarity is the ultimate goal—as both the *Quill* majority and concurrence said it was, *see* 504 U.S. at 315, 321—then clearly S.B. 106 should be both upheld and held up as a model rule.

B. Eliminating the physical-presence rule does not require this Court to hold that *Bellas Hess* and *Quill* were wrong when decided.

Because, even 25 years ago, *Quill* intimated that this Court would not write the sales-tax-only, physical-presence rule on a blank slate, that rule's defense has always depended on *stare decisis*. *See* 504 U.S. at 311. But there is a critical difference between this case and *Quill* in that respect. *Quill* did articulate a "physical-presence" rule and petitioner acknowledges that this Court must reject that rule to hold in its favor. But this Court did not (and could not) consider how its holding would apply to pervasive internet retail when it chose those particular words to articulate its ruling because internet retail did not exist. In *Quill*, by contrast, the factual premise was word-for-word identical to *Bellas Hess*, *see supra* p.7. *Stare decisis* accordingly has less force here because—while a lower court could not have made this distinction—this Court need not treat *Quill*'s 25-year-old description of the rule as requiring a "*physical* presence" as having rendered a

considered judgment on whether remote retail in the digital age is distinguishable from traditional catalog mailing.

Unlike with statutes—which cover the scope of their enacted text whether the legislature had certain scenarios in mind or not, *see Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 618 (1992)—the force of this Court's holdings derives from the "case or controversy" before it. Lower courts must follow a rule this Court articulates or the broad reasoning it employs to reach its holding. *See, e.g.*, *DMA II*, 814 F.3d at 1148-49 (Gorsuch, J., concurring) (noting broad deference owed to Supreme Court reasoning by lower courts). But particularly when this Court evaluates its own precedents, it is the force of the analogy between one case and another that governs the common-law method and the power of *stare decisis*, much more than the particular words this Court chooses to express itself. As Chief Justice Marshall explained:

> It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated.

Cohens v. Virginia, 19 U.S. (6 Wheat.) 264, 399-400 (1821); *see also Heck v. Humphrey*, 512 U.S. 477, 482 (1994) (a precedent can be an "unreliable ... guide" where that "opinion had no cause to address, and did not carefully consider, the ... question before us today"); *Carroll v. Carroll's Lessee*, 57 U.S. (16 How.) 275, 287 (1854) ("[T]his court and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties.")

Judged from that standpoint, this Court now confronts a very different controversy from the one it considered in *Quill*. Both *Quill* and *Bellas Hess* expressed their factual holdings by reference to the limited nature of the seller's contacts with the State: According to *Quill*, *Bellas Hess* "stands for the proposition that a vendor whose *only* contacts with the taxing State are by mail or common carrier lacks the 'substantial nexus' required by the Commerce Clause." 504 U.S. at 311 (emphasis added); *id.* at 315 (quoting *Bellas Hess* and again describing its bright-line rule the same way). That holding can be retained if this Court chooses. To abrogate the physical-presence requirement, this Court need not quarrel with the conclusion that catalog-only retailers lack a sufficient nexus to justify a collection requirement under *Complete Auto*. Whatever else is true of respondents, they cannot analogize themselves to analog-era catalog mailers or claim that their "'only connection with customers'" in South Dakota "'is by common carrier.'" *Id.* at 315.

Consider how different respondents are (and the modern Quill.com is) from Quill's 1990s office-supply business. Quill solicited customers in North Dakota

through periodic mailings, advertisements in national journals, and telephone calls. *See id.* at 302. That is miles away from how respondents interact with South Dakotans. As Justice Kennedy summarized the difference:

> Although online businesses may not have a physical presence in some States, the Web has, in many ways, brought the average American closer to most major retailers. A connection to a shopper's favorite store is a click away—regardless of how close or far the nearest storefront. .... Today buyers have almost instant access to most retailers via cell phones, tablets, and laptops. As a result, a business may be present in a State in a meaningful way without that presence being physical in the traditional sense of the term.

DMA, 135 S. Ct. at 1135. Likewise, consider how distant the statute at issue here is from the North Dakota statute in *Quill*. The latter would have found nexus on the mere basis of *three advertisements* in the State, *see* 504 U.S. at 303, 313 n.6; the former requires a significant economic presence in the State's market. These are simply not questions this Court considered when, in *Quill*, it evaluated whether there had been a pure change in the law governing traditional mail-order houses between 1967 and 1992.

In short, the "virtual presence" now associated with large-scale internet retailers was inconceivable when *Quill* described the rule as a "physical presence" requirement decades ago. This Court thus should not treat the question presented here as one on which it has previously rendered considered judgment for purposes of *stare decisis*. Whatever was or remains true

of traditional catalog mailers, this Court can still recognize that its "physical presence" articulation has been rendered inapt, and that large-scale internet retailers like respondents are "present" in South Dakota in every way that counts. At a minimum, the dissimilarity between respondents and Quill—a factor that was absent as to the two catalog-mailers in *Quill* and *Bellas Hess*—makes *stare decisis* much weaker here than in *Quill* itself.

C. The burden of sales-tax collection is now marginal.

Those who hope to maintain the duty-free mirage that *Quill* provides to internet-only retailers will often argue that the "6,000-plus" tax jurisdictions that concerned the Court in *Quill* have now increased to something like 16,000, *see* Opp. 15-16—making collection compliance even more difficult and giving continued vitality to the physical-presence rule. This is numerical hocus pocus, and it ignores everything that technology and the States themselves have done to ease compliance burdens over the past 25 years. In reality, the same forces that unleashed respondents' business models as nationwide internet retailers have made these kinds of data-heavy logistics issues cheap and easy to solve.

Respondents' scary-looking number counts separate "tax jurisdictions" wherever rate variations are theoretically possible, even in the many States (like South Dakota) where sales-tax collection and audit functions are centralized at the state level. As of 2015, there were only six States that did not simplify com-

pliance in this way—Alabama, Alaska, Arizona, Colorado, Idaho, and Louisiana[13]—and Alabama recently left that group with a new simplified system. *See supra* p.14. Accordingly, for all purposes except determining a local rate, respondents' 16,000 jurisdictions statistic is off by something like 15,750 jurisdictions. *See* IPT Report, *supra* n.13, at 18 tbl.4.

Rate calculation, meanwhile, is now as easy as typing a shipping address into a search bar. (You can try it on this handy *worldwide* map that CSP "TaxCloud" provides for free: https://taxcloud.net/#Find-a-Rate.) And, notably, for remote retailers like respondents to ship goods that consumers order, consumers must already enter their digitally coded address, which the retailer can use to automatically calculate the applicable sales-tax rates using software that companies like TaxCloud provide and that interfaces directly with almost every online "shopping cart" program now in use. *See generally* https://www.youtube.com/watch?v=2aoElcxwtac.[14] In the internet age—where all required tax information, addresses, prices, and products are necessarily digitized just to make respondents' business models work—determining the applicable rate and collecting it as part of the same credit-card transaction is a trivial matter for any web-based program.

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[13] *See* Inst. for Prof'ls in Taxation, *Locally Administered Sales and Use Taxes* (2016), http://www.ipt.org/iptdocs//Files/MiscForms/CompleteStudy.pdf.

[14] This 13-minute YouTube video from TaxCloud walks through the entire set-up process, details the many options available, and explains the circumstances in which TaxCloud will provide all compliance needs *for free*.

Accordingly, there are now a host of tax-compliance providers with programs that interface directly with e-commerce sites and automate the entire sales-tax process. *See supra* pp.14-15; CSP Br. Part A. One option—called "TaxJar"—will calculate the tax on a seller's every transaction and produce "Return-ready" reports for every State, with rates beginning at $17 for up to 1000 transactions per month. https://www.taxjar.com/pricing/plans/. And on a per-transaction basis, this rate (1.7 pennies per sale) is their *highest*: For the companies most likely to meet South Dakota's 200-transaction threshold, the rate falls to *three-tenths of a penny* per transaction. *Id.* If sellers do not want to file returns themselves based on these "return-ready reports," TaxJar provides an "AutoFile" service with rates starting at $20 per filing and falling from there. https://www.taxjar.com/autofile/#pricing. Other options are less expensive generally, or provide different pricing paradigms that may fit more cheaply and efficiently into any given seller's business model. *See* Yetter & Crosby at 579; CSP Br. Part B. And regardless of which option a seller chooses, the costs are miniscule compared to other costs associated with this business including credit-card interchange fees, shipping fees, inventory maintenance, and marketing.

Compliance burden complaints are also particularly egregious with respect to South Dakota. Because South Dakota has implemented the Streamlined Agreement, *see supra* pp.13-14, it not only simplified on a statewide basis, but also regularized its definitions and filing procedures with 23 other States. And, more importantly, that status makes collection and remittance service from the CSPs available to retailers *at no charge*. *See supra* p.14; SST Cert. Br. 12-13. If

a seller is willing to collect the tax in the Streamlined member States, the cost of that compliance is not just commensurate with ordinary business expenses—it's essentially zero.

In fact, respondents could arguably *make* money from a compliance-cost perspective by voluntarily collecting in South Dakota and other Streamlined States. That is because some CSPs (like TaxCloud) will charge nothing to automate the entire compliance process in a seller's *home* State—where it already has a physical presence—if sellers turn on automated compliance in the Streamlined states. *See* CSP Br. Part B; *supra* p.45 & n.14. Retailers also receive compensation from States for timely collection, and sellers can collect interest on the tax (or otherwise benefit from the float) between the time the tax is collected and remitted. *See generally* CSP Br. Part B. If the issue were only compliance costs (and not the improper appearance of duty-free pricing), voluntary nationwide compliance would now be a no-brainer. Yetter & Crosby at 579-80.

None of this is surprising: Because the compliance task is now a simple software operation, the marginal cost of adding one additional jurisdiction is tiny. And nearly every internet retailer already has a system for collecting sales tax integrated into their online shopping cart because they must collect in at least their home State. Thus, as Systemax's overnight compliance in this case demonstrates, it is likely that a mouse click is all that stands between respondents and collection.

D. Abrogating the physical-presence rule in this case raises no special problems of retroactive taxation.

There is also no need to fear the specter of retroactive tax liability that apparently concerned this Court in *Bellas Hess* and *Quill*. Critically, South Dakota avoided this issue by expressly prohibiting *any* retroactive taxation in S.B. 106, and this Court need not consider the issue here. But if this Court is concerned that eliminating the physical-presence rule will result in burdensome or punitive back-tax liability for respondents or other sellers in other States, there are both political and legal barriers that should prevent that specter from materializing.

Begin with the practical and political safeguards against retroactivity. South Dakota's law has already become a model for other States, *see* Pet. 8-11, and it expressly forbids retroactivity. *See* App. 3a (§5). If this Court were to bless it, most other States would likely follow suit. And they would have reason to do so apart from the certainty of surviving legal challenge: No State would want its sister States to impose retroactive liability on their own resident businesses.

Moreover, seeking back taxes would be barred in most States by existing state law. At present, laws or regulations in most States define nexus in terms of physical presence or existing constitutional limits and so do not authorize collection from out-of-state retailers like respondents. *See* App. 7a-8a.[15] States in that

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[15] A comprehensive survey in this regard is difficult because *no State* presently mandates collection because of *Quill*, and no

posture create no special risk of retroactivity because state law itself would need to change before any tax became due.

State courts are thus likely to bar retroactivity themselves. Consider a recent example from Massachusetts. That State originally attempted to require out-of-state internet retailers to begin collecting by issuing a simple notice. But after a state administrative-law challenge and a skeptical reception in court, the State scrapped that effort and undertook to pass a new prospective regulation. *See* Claire Parker, *Out-of-State Internet Sellers Get Tax Reprieve, for Now*, Boston Globe (June 29, 2017), https://www.bostonglobe.com/business/2017/06/29/state-internet-sales-tax-gets-reprieve-for-now/IwtdxjX3YX8ZdBuzOLwMaK/story.html.

If these safeguards all fail, Congress could also step in. A decision by this Court abrogating the Court-created physical-presence rule in no way limits what Congress can accomplish with its affirmative powers under the Commerce Clause. In the unlikely scenario where States attempted to impose retroactive liability, there would be a powerful constituency for congressional intervention. And unlike the *status quo*, where the States must beg Congress to devolve its own power back to the States, *see infra* pp.53-54, Congress would be in its ordinary role of solving a pressing problem in interstate commerce, and have an incentive to act to protect its constituents.

State has intimated any interest at all in seeking retroactive liability. Nonetheless, Appendix B, *infra*, sets out the (at least) 40 States in which we have identified a state law, regulation, recent change, or incorporation of existing constitutional limits that appears to exclude any threat of retroactive liability.

There is even a strong argument that, if all else fails, *Complete Auto* itself bars retroactive liability. That is because any item respondents *previously* sold has already been taxed once: Any relevant State will have required the purchaser to pay a use tax because the seller (under *Quill*) did not collect the sales tax. *See supra* p.3 n.1. To be sure, most consumers do not pay their use taxes, but the States have no way of knowing what use taxes were paid on what items in the past. And in any event, constitutional doctrine cannot ignore the fact that a tax *was* already imposed on the sale as a matter of law by any State that might now try to retroactively tax the sale again. That means the State is double-taxing only the items already sold by out-of-state retailers—a discriminatory treatment that may itself violate the dormant commerce clause. *See, e.g.*, *Granholm v. Heald*, 544 U.S. 460, 472 (2005) ("[S]tate laws violate the Commerce Clause if they mandate 'differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter.'"); *Complete Auto*, 430 U.S. at 279 (same); *see also* Daniel Hemel, *There Is No Retroactivity Concern with Overruling Quill*, Medium (Jan. 28, 2018), https://medium.com/whatever-source-derived/there-is-no-retroactivity-concern-with-overruling-quill-f6623da6a2d7 (advancing this argument in detail).

Finally, doctrinal changes since *Quill* now make clear that overturning *Bellas Hess* would create no special problems of unforeseen tax liability—an evident concern in *Quill* itself. *See* 504 U.S. at 318 n.10. Normally, we worry about courts changing their rules because it is the only way that someone might be pe-

nalized for something that was previously legal or deprived of property in which they previously had a settled expectation. *See* U.S. Const. art. I, §§9-10, amends. V, XIV (forbidding state and federal legislatures from passing *ex post facto* laws or taking property without just compensation). Because retroactive changes in judicial doctrine can seem to have those effects, reliance interests can sometimes recommend against a change in precedent.

But this Court clarified after *Quill* that such reliance is inappropriate in the taxing context. In *United States v. Carlton*, 512 U.S. 26, 30-31 (1994), it held that even *legislatures* can change tax laws retroactively. If taxpayers cannot assume that the tax laws themselves will change only on a prospective basis, they cannot rely on judicial doctrines about those laws to be any more fixed. Put otherwise, in this narrow context, overturning the physical-presence rule creates only the same risk of retroactivity that any taxpayer faces every day under *Carlton*, and should give the Court no particular pause.

III. *Stare Decisis* Does Not Justify Retaining The Physical-Presence Rule.

Key reasons to abrogate the physical-presence rule notwithstanding the force of *stare decisis* are laid out above. It is nonetheless worth noting that many more of the "special justifications" this Court has articulated for overturning precedent are present in this case. *See Kimble*, 135 S. Ct. at 2409; *DMA*, 135 S. Ct. at 1134-35 (Kennedy, J., concurring).

1. *Changed Circumstances.* This Court is far more likely to revise precedents when the justification is "an important change in circumstances in the outside world." *Arizona v. Gant*, 556 U.S. 332, 358 (2009)

(Alito, J., dissenting) (citing, *inter alia*, *Randall v. Sorrell*, 548 U.S. 230, 244 (2006) (plurality)). And here, the case for abrogating the physical-presence rule depends far more on a dramatic change of factual circumstances than on the argument that *Quill* was wrong when it was decided. *See supra* Part I.C.

Indeed, *stare decisis* should be particularly weak here because *Quill itself* was based on policy judgments about then-present facts. *See supra* pp.8, 28. Using the example of the Sherman Act, this Court has recently explained that *stare decisis* is at its weakest when the relevant area of law is explicitly based on economic judgments that can evolve with greater scientific understanding or changing commercial circumstances. *See Kimble*, 135 S. Ct. at 2412-13. As *Quill* explained, the dormant commerce clause is generally dependent on economic policy judgment. *See* 504 U.S. at 312 ("[T]he Commerce Clause and its nexus requirement are informed ... by structural concerns about the effects of state regulation on the national economy."). And *Quill* thus based its retention of the physical-presence rule on the judgment that it would "foster[] investment by businesses and individuals" far more than it would harm States or inefficiently disrupt interstate commerce and the national economy. *Id.* at 316. The explosion of internet retail and the falling costs of compliance have together rendered these economic conclusions unsound. *See supra* pp.9-15. As the *amici* economists and tax professors have put it, overturning *Quill*'s factually contingent conclusion "'in light of sounder economic reasoning'" thus takes the decision "'on [its] own terms.'" Professors' Cert. Br. 8 (quoting *Kimble*, 135 S. Ct. at 2413).

2. *Constitutional Rule.* It is also "this Court's considered practice not to apply *stare decisis* as rigidly in constitutional as in nonconstitutional cases," *Glidden Co. v. Zdanok*, 370 U.S. 530, 543 (1962) (plurality); *see Arizona v. Rumsey*, 467 U.S. 203, 212 (1984) ("[A]dherence to precedent is not rigidly required in constitutional cases[.]"). *Quill* is plainly a constitutional holding, so this factor likewise supports petitioner here.

To be sure, *Quill* suggests that *stare decisis* might have more force here than in the typical constitutional case because, in this rare instance, Congress can abrogate the Court's holding. *See* 504 U.S. at 318. But as this Court recently clarified, the lower constitutional standard applies to "judge-made rule[s]," even when they are technically subject to congressional reconsideration. *Pearson v. Callahan*, 555 U.S. 223, 233 (2009). The Constitution enumerates the limited powers of Congress, *see* U.S. Const. art. I, §8, and explicitly reserves all other powers for the States by default, *see id.* amend. X. *Quill* disturbs that design, and while Congress could *moot* that effect by passing affirmative legislation to devolve power back to the States, that would not *fix* the way *Quill*'s holding warps the separation of powers in the first place.

The Founders well understood that no branch of government could be trusted to just give its powers away. If an error of this Court misallocated a presidential power to Congress by default, it would not treat that error as statutory for *stare decisis* purposes just because Congress could give it back. Given the emphasis supplied by the Tenth Amendment, this

Court should not treat errors in the federal/state separation of powers any more forgivingly than errors among the federal branches.

This is especially true because, as 25 years of congressional inaction following *Quill*'s invitation have shown, *see* 504 U.S. at 318, the default rule can make all the difference. Congress has little incentive to act here because it would be (or *appear* to be) authorizing new or greater tax collections from its constituents, while receiving none of the revenue in return. And even if Congress did act, whatever compromise legislation emerged would bear the fingerprints of how the physical-presence rule changed the default and forced the States to beg or bargain for their powers back. The dormant commerce clause is a court-fashioned constitutional doctrine, and this Court is responsible for correcting its distortionary effects—as demonstrated by the correction this Court made in *Complete Auto* itself. *See* 430 U.S. at 288-89.

3. *Reliance*. As to the important question of reliance interests, there is a marked difference between today and 1992. In *Quill*, this Court expressed concern that the physical-presence requirement had "become part of the basic framework of a sizable industry," attributing the growth of mail-order in part to *Bellas Hess*'s "bright-line exemption from state taxation." 504 U.S. at 316-17. Today, however, there are three reasons to discount such claims of reliance.

First, while *Quill* postulated that a "bright-line exemption from state taxation" had "become part of the basic framework" of the mail-order industry, *id.*, there *is no exemption* from state taxation for interstate sales. Instead, the tax is still owed (as a use tax), and *Quill* only prevents the State from making the remote

retailer *collect* it. *See DMA*, 135 S. Ct. at 1127. This important point is often overlooked because remote sellers frequently (and deceptively) advertise their sales as "no tax." *See* App. 4a (§8(3)). As Wayfair puts it on its website: "One of the best things about buying through Wayfair is that we do not have to charge sales tax."[16] But this is not a *legitimate* reliance interest; no one is entitled to rely on how their business model benefits from (or even encourages) widespread tax avoidance. A proper accounting of the physical-presence rule's legitimate reliance interests is limited to concerns about collection costs, which have fallen precipitously. *See supra* Part II.C.

As then-Judge Gorsuch explained, a second, critical difference in reliance interests between today and 1992 stems from *Quill* itself, which essentially invited States to impose other, no-less-burdensome requirements on out-of-state retailers. *See supra* p.25; *DMA II*, 814 F.3d at 1151. When an exception is so isolated from the doctrine and so does not cover similar burdens imposed in similar situations, it often disappears as "reliance interests never form ... or erode over time." *Id.* Accordingly, "*Quill*'s very reasoning—its *ratio decidendi*—seems deliberately designed to ensure that *Bellas Hess*'s precedential island would never expand but would, if anything, wash away with the tides of time." *Id.*

Finally, *Quill* itself warns any reasonably attentive seller against blind reliance on its lasting vitality. Beyond recognizing its tension with contemporary

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[16] Wayfair.com, Ordering Information, https://www.wayfair.com/customerservice/ordering_info.php?rtype=7&redir=sales+tax#tax (last visited Feb. 26, 2018).

doctrine, *Quill* repeatedly employs temporary formulations, indicating that the time to abandon *Bellas Hess* may yet come. *See, e.g.*, 504 U.S. at 318 (noting *stare decisis* factor recommends "'withholding our hand, at least for now'"); *id.* ("[W]e disagree ... that the time has come to renounce the bright-line test of *Bellas Hess*."). In fact, in jettisoning *Bellas Hess*'s due-process holding, *Quill* expressly invited Congress to enact "legislation that would 'overrule' the *Bellas Hess* rule." *Id.* It would be unwise to rely heavily on a rule Congress might dissolve with this Court's blessing, or this Court might soon dissolve itself. And as this Court has explained since *Quill*, rules about taxes in particular are "not a promise, and a taxpayer has no vested right in the Internal Revenue Code." *Carlton*, 512 U.S. at 33.

4. *Constant Criticism & Inconsistency.* It also "weigh[s] in favor of reconsideration" when a precedent "has 'been questioned by Members of the Court in later decisions and has defied consistent application by the lower courts.'" *Pearson*, 555 U.S. at 235 (alteration omitted). *Quill* has been quite criticized—particularly recently—in this Court and the lower courts. *See supra* pp.20, 24-27. And to the extent *Quill* has been applied consistently in the lower courts, it is only by radically constraining that decision to its precise facts. *See supra* p.26. This makes *Quill* "a positive detriment to coherence and consistency in the law," *Patterson v. McLean Credit Union*, 491 U.S. 164, 173 (1989): While its application has been consistently narrow, that comes at the cost of making dormant-commerce-clause doctrine consistently inconsistent.

Indeed, *ad hoc* exceptions like *Quill* often become incoherent and "unworkable" precisely because they

unmoored from other doctrinal guideposts. *See supra* pp.26-27. And *Quill* certainly is an "island," *DMA II*, 814 F.3d at 1151 (Gorsuch, J., concurring)—"the kind of doctrinal dinosaur or legal last-man-standing for which we sometimes depart from *stare decisis*." *Kimble*, 135 S. Ct. at 2411. In recent Terms, this Court has confirmed that it is appropriate to overrule a case, even after it has been reaffirmed once on *stare decisis* grounds, where it "has become even more of an outlier," and the Court finds it necessary to "'erase th[e] anomaly.'" *Alleyne v. United States*, 570 U.S. 99, 120 (2013) (Sotomayor, J., concurring). This Court has done its best to limit expansive judicial policymaking under the dormant commerce clause—at least outside the core ends of avoiding discrimination and double taxation. *See, e.g.*, *McBurney v. Young*, 569 U.S. 221, 235-37 (2013) (rejecting dormant-commerce-clause challenge). The physical-presence exception undermines that effort, particularly because it *causes* discrimination and undue burdens of the kind the clause would ordinarily condemn. *See supra* pp.32-34.

Relatedly, because it is such an outlier, this Court can excise *Quill* with complete confidence that it will not confound Commerce-Clause doctrine in any way. No subsequent holding for the last 25 years has depended on *Quill* or its physical-presence rule. *Quill* is merely a vestige of other, already-expired precedents, and has no place in contemporary doctrine.

5. *Experience & Workability*. Finally, *Quill* is a case where "experience has pointed up the precedent's shortcomings," *Pearson*, 555 U.S. at 233, and demonstrated that *Quill*'s supposedly bright-line rule is now increasingly "unworkable," *see, e.g.*, *Montejo v. Louisiana*, 556 U.S. 778, 792 (2009). *Quill*'s fundamental

premise was that, at the very least, its bright-line, physical-presence rule would be an easily administered safe-harbor. But that has turned out to be incorrect; since *Quill*, questions about the limits of the physical-presence rule have multiplied. *See supra* pp.31-32. And that phenomenon will only grow worse if this Court retains the rule here, given how badly non-collection is hurting the States, and how much success they have had in redefining physical presence or rendering it "insubstantial." *Supra* p.26.

Indeed, this is the best reason of all to be rid of the physical-presence rule and to affirm South Dakota's economic-nexus approach. Taking *Quill* on its own terms, South Dakota's statute fares far better in achieving *Quill*'s own goals. The rule it employs guarantees that the retailer's relationship to the State and its market is "substantial" (as *Complete Auto* requires), based on a legally and economically meaningful measure. This Court has been particularly willing to reconsider an old rule when, in contemporary context, it becomes "an increasingly unjustifiable anomaly" that "produce[s] litigation-spawning confusion in an area that should be easily susceptible of more workable solutions." *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 404 (1970). South Dakota's law offers a far "more workable solution" to the problems *Quill* wanted to solve: Its line is bright, its safe-harbor is economically relevant in avoiding undue burdens, and it does not discourage businesses from participating in interstate commerce through physical investment or local job creation. The sales-tax-only, physical-presence exception to *Complete Auto* should thus be abrogated, and South Dakota's law upheld.

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

Eric F. Citron
Counsel of Record
Thomas C. Goldstein
Jeanne Jeong
Erica Oleszczuk Evans
GOLDSTEIN & RUSSELL, P.C.
7475 Wisconsin Ave.
Suite 850
Bethesda, MD 20814
(202) 362-0636
ec@goldsteinrussell.com

Marty J. Jackley
Attorney General
Richard M. Williams
Deputy Attorney General
Kirsten E. Jasper
Assistant Attorney General
1302 E. Hwy 13, Suite 1
Pierre, SD 57501
(605) 773-3215

Andrew L. Fergel
Special Assistant Attorney General &
Chief Legal Counsel
Department of Revenue
445 East Capitol Ave.
Pierre, SD 57501
(605) 773-3533

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APPENDIX

APPENDIX A

S.B. 106, 91st Legis. Assemb. Session (S.D. 2016)

AN ACT

ENTITLED, An Act to provide for the collection of sales taxes from certain remote sellers, to establish certain Legislative findings, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, any seller selling tangible personal property, products transferred electronically, or services for delivery into South Dakota, who does not have a physical presence in the state, is subject to chapters 10-45 and 10-52, shall remit the sales tax and shall follow all applicable procedures and requirements of law as if the seller had a physical presence in the state, provided the seller meets either of the following criteria in the previous calendar year or the current calendar year:

(1) The seller's gross revenue from the sale of tangible personal property, any product transferred electronically, or services delivered into South Dakota exceeds one hundred thousand dollars; or

(2) The seller sold tangible personal property, any product transferred electronically, or services for delivery into South Dakota in two hundred or more separate transactions.

Section 2. That the code be amended by adding a NEW SECTION to read:

Notwithstanding any other provision of law, and whether or not the state initiates an audit or other tax collection procedure, the state may bring a declaratory judgment action under chapter 21-24 in any circuit court against any person the state believes meets the criteria of section 1 of this Act to establish that the obligation to remit sales tax is applicable and valid under state and federal law. The circuit court shall act on this declaratory judgment action as expeditiously as possible and this action shall proceed with priority over any other action presenting the same question in any other venue.

In this action, the court shall presume that the matter may be fully resolved through a motion to dismiss or a motion for summary judgment. However, if these motions do not resolve the action, any discovery allowed by the court may not exceed the provisions of subdivisions 15-6-73(2) and (4).

The provisions of § 10-59-34, along with any other provisions authorizing attorney's fees, do not apply to any action brought pursuant to this Act or any appeal from any action brought pursuant to this Act.

Section 3. That the code be amended by adding a NEW SECTION to read:

The filing of the declaratory judgment action established in this Act by the state operates as an injunction during the pendency of the action, applicable to each state entity, prohibiting any state entity from enforcing the obligation in section 1 of this Act against any taxpayer who does not affirmatively consent or otherwise remit the sales tax on a voluntary basis.

The injunction does not apply if there is a previous judgment from a court establishing the validity of the obligation in section 1 of this Act with respect to the particular taxpayer.

Section 4. That the code be amended by adding a NEW SECTION to read:

Any appeal from the decision with respect to the cause of action established by this Act may only be made to the state Supreme Court. The appeal shall be heard as expeditiously as possible.

Section 5. That the code be amended by adding a NEW SECTION to read:

No obligation to remit the sales tax required by this Act may be applied retroactively.

Section 6. That the code be amended by adding a NEW SECTION to read:

If an injunction provided by this Act is lifted or dissolved, in general or with respect to a specific taxpayer, the state shall assess and apply the obligation established in section 1 of this Act from that date forward with respect to any taxpayer covered by the injunction.

Section 7. That the code be amended by adding a NEW SECTION to read:

A taxpayer complying with this Act, voluntarily or otherwise, may only seek a recovery of taxes, penalties, or interest by following the recovery procedures established pursuant to chapter 10-59. However, no claim may be granted on the basis that the taxpayer lacked a physical presence in the state and complied with this Act voluntarily while covered by the injunction provided in section 3 of this Act.

Nothing in this Act limits the ability of any taxpayer to obtain a refund for any other reason, including a mistake of fact or mathematical miscalculation of the applicable tax.

No seller who remits sales tax voluntarily or otherwise under this Act is liable to a purchaser who claims that the sales tax has been over-collected because a provision of this Act is later deemed unlawful.

Nothing in this Act affects the obligation of any purchaser from this state to remit use tax as to any applicable transaction in which the seller does not collect and remit or remit an offsetting sales tax.

Section 8. That the code be amended by adding a NEW SECTION to read:

The Legislature finds that:

(1) The inability to effectively collect the sales or use tax from remote sellers who deliver tangible personal property, products transferred electronically, or services directly into South Dakota is seriously eroding the sales tax base of this state, causing revenue losses and imminent harm to this state through the loss of critical funding for state and local services;

(2) The harm from the loss of revenue is especially serious in South Dakota because the state has no income tax, and sales and use tax revenues are essential in funding state and local services;

(3) Despite the fact that a use tax is owed on tangible personal property, any product transferred electronically, or services delivered for use in this state, many remote sellers actively market sales as tax free or no sales tax transactions;

(4) The structural advantages of remote sellers, including the absence of point-of-sale tax collection, along with the general growth of online retail, make clear that further erosion of this state's sales tax base is likely in the near future;

(5) Remote sellers who make a substantial number of deliveries into or have large gross revenues from South Dakota benefit extensively from this state's market, including the economy generally, as well as state infrastructure;

(6) In contrast with the expanding harms caused to the state from this exemption of sales tax collection duties for remote sellers, the costs of that collection have fallen. Given modern computing and software options, it is neither unusually difficult nor burdensome for remote sellers to collect and remit sales taxes associated with sales into South Dakota;

(7) As Justice Kennedy recently recognized in his concurrence in *Direct Marketing Association v. Brohl*, the Supreme Court of the United States should reconsider its doctrine that prevents states from requiring remote sellers to collect sales tax, and as the foregoing findings make clear, this argument has grown stronger, and the cause more urgent, with time;

(8) Given the urgent need for the Supreme Court of the United States to reconsider this doctrine, it is necessary for this state to pass this law clarifying its immediate intent to require collection of sales taxes by remote sellers, and permitting the most expeditious possible review of the constitutionality of this law;

(9) Expeditious review is necessary and appropriate because, while it may be reasonable notwithstanding this law for remote sellers to continue to refuse to collect the sales tax in light of existing federal constitutional doctrine, any such refusal causes imminent harm to this state;

(10) At the same time, the Legislature recognizes that the enactment of this law places remote sellers in a complicated position, precisely because existing constitutional doctrine calls this law into question. Accordingly, the Legislature intends to clarify that the obligations created by this law would be appropriately stayed by the courts until the constitutionality of this law has been clearly established by a binding judgment, including, for example, a decision from the Supreme Court of the United States abrogating its existing doctrine, or a final judgment applicable to a particular taxpayer; and

(11) It is the intent of the Legislature to apply South Dakota's sales and use tax obligations to the limit of federal and state constitutional doctrines, and to thereby clarify that South Dakota law permits the state to immediately argue in any litigation that such constitutional doctrine should be changed to permit the collection obligations of this Act.

Section 9. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist. This Act shall be in full force and effect on the first day of the first month that is at least fifteen calendar days from the date this Act is signed by the Governor.

APPENDIX B

States with statutes that do not permit collection from out-of-state retailers or expressly forbid retroactivity: 19

- **Alaska** (no sales tax); **Delaware** (no sales tax); **Hawaii** (Haw. Rev. Stat. §237-22(a)); **Indiana** (House Enrolled Act No. 1129 (2017)); **Iowa** (Iowa Code §423.30); **Louisiana** (La. Rev. Stat. Ann. §47:305); **Maine** (Me. Rev. Stat. Ann. § 1754-B); **Minnesota** (Minn. Stat. §297A.66, Subd. 2(a)); Minn. Stat. §297A.77 ; Minn. R. §8130.2500, subpart 1); **Missouri** (Mo. Code Regs. 10-114.100); **Montana** (no sales tax); **New Hampshire** (no sales tax); **New Mexico** (NMSA 1978 §7-9-10); **Oregon** (no sales tax); **South Carolina** (S.C. Code Ann. §12-36-1340); **South Dakota** (S.B. 106 (2016)); **Tennessee** (S.B. 53/H.B. 261, 110th General Assembly; Notice 17-12 (2017)); **Utah** (Utah Code Ann. §59-12-107(2)(a)(iii); Utah Informational Publication No. 37, 03/01/2016); **Vermont** (Vt. Stat. Ann. §9701); **Wyoming** (H.B. 19 (2017))

States with regulations or official guidance that require out-of-state retailers to have a physical presence for collection to apply: 7

- **Arizona** (Arizona Transaction Privilege Tax Ruling No. 16-1, 09/20/2016); **California** (California SBE Information Publication No. 77, 11/01/2015); **Colorado** (Colorado FYI Tax Publication No. Sales 5, 04/01/2013); **Florida** (*Share Int'l, Inc.*, 676 So. 2d. 1362 (Fl. 1996); Florida Technical Assistance Advisement No. 06A-31, 10/24/2006); **Michigan** (Michigan Revenue Administrative

Bulletin 1999-1, 05/12/1999); **New Jersey** (NJ Division of Taxation Technical Bulletin, No. TB-78, 07/30/2015); **Texas** (Texas Tax Pub. 94-108, 11/01/2016)

States where recent changes in law or rule have been enacted to permit collection from out-of-state retailers, implying that its preexisting law did not so permit: 8

- **Alabama** (Revenue Rule 810-6-2-.90.03); **Arkansas** (Ark. Code Ann. §26-53-121; Ark. Code Ann. §26-53-124(a)(1)(B)); **Massachusetts** (830 CMR 64H.1.7); **Mississippi** (Miss. Administrative Code §35.IV.3.09(100); Miss. Administrative Code §35.IV.3.09(103)); **Ohio** (Ohio Rev. Code Ann. §5741.01); **Pennsylvania** (Act 43 (H.B. 542)); **Rhode Island** (R.I. Gen. Laws §44-18.2-2(4); Notice: To All Non-Collecting Retailers, R.I. Div. of Taxation, Notice 2017-09, 08/04/2017)); **Washington** (HB 2163, Ch. 28, Laws of 2017)

States where statute or law incorporates constitutional standards or existing U.S. Supreme Court decisions: 6

- **Georgia** (O.C.G.A. §48-8-1); **Idaho** (Idaho Code §63-3611); **Kansas** (Kan. Stat. Ann. §79-3705c; Kan. Admin. Regs. §92-20-7(e)); **Nevada** (NRS 372.724); **West Virginia** (Code of State Rules §110-15-2.78); **Wisconsin** (Wis. Admin. Code Tax 11.97)